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IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1706

IVAN W. HYATT,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on March 21, 1973.

Citations to Opinions Below.

The opinion of the Court of Appeal, Fourth District, Second Division, State of California is unreported and is printed in Appendix B hereto, *infra,* p. 3.

Jurisdiction.

The judgment of the Court of Appeal was entered on January 26, 1973. Rehearing was denied on February 22, 1973. Petition for hearing to the Supreme Court of the State of California was denied on March 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether under F.E.L.A. in an off-premise accident there is no duty of care owed by the employer to an employee, injured while on duty and engaged in an activity within the scope of his employment, unless the accident occurs at a place where the employer exercises dominion and control or where the employee is required to be in the performance of a duty to the employer.

2. Whether F.E.L.A. excludes the hazard of crossing a busy highway from the risks an employer must guard against in providing its employees with a reasonably safe place to work.

3. Whether petitioner has been wrongfully denied his statutory and constitutional right to a jury trial.

Statute Involved.

The statutory provisions involved are 45 U.S.C. §§ 51 and 54. They are printed in Appendix A, *infra* p. 1.

Statement.

Petitioner, a railroad worker employed by respondent, was injured when struck by a car while walking across U.S. Highway 66 in Gallup, New Mexico. He was on call and on duty and off of the employer's premises with its knowledge and acquiescence. He was returning from a cafe located across the highway from respondent's railroad yard where he had eaten his evening meal while on a paid 20 minutes "lunch break". It was conceded that the respondent was then engaged in interstate commerce and petitioner was injured while engaged in such commerce. The Court of Appeal

noted that the evidence established as a matter of law that the petitioner was within the scope of his employment at the time and place of his injury.

A misunderstanding by the Court of Appeal as to where the accident occurred could not but have materially affected its decision. It erroneously believed that petitioner was hit on the "wrong side" of the center line of the highway. He was in fact hit 2 to 3 feet north of the line dividing the two eastbound lanes. [T. 588.] The car did not swerve before impact but maintained a straight course. [T. 586.] It was *after* the impact that the car swerved into a westbound lane (on the wrong side). [T. 586.]

The accident occurred at an uncontrolled "T" intersection where there was no marked crosswalk. It was a 40 mile per hour speed zone and traffic was usually heavy at this location. The area was hazardous and the employer knew that another of its employees had previously been injured at this same location and in the same manner. The employer had no eating facilities on its premises and knew that its employees regularly crossed the highway at this location to obtain food and that the only food available was across the highway. It did not object to this practice. As a matter of fact the railroad constructed an asphalt pathway from its yard office to and beyond a boundary fence and out to Highway 66. This walkway was regularly used by its employees to facilitate entry to and exit from its premises through an opening in the fence.

In support of petitioner's theory that respondent expected the petitioner to cross the highway to eat and that credit was established for petitioner as an accommodation to his employer, the following evidence was introduced: that it was common for an employee to be without funds when he first hired out. [T 247.] In connection with his job petitioner was required to purchase a watch, boots, raincoat and overnight bag which he had not anticipated. [T. 245, 247.] His first paycheck would not be forthcoming for a little more than three weeks. [T. 247-248.] His conductor arranged credit for him for food and lodging on his initial run to Belen, Arizona. [T. 245, 247.] He also made the same arrangement for food at Virgie's Cafe at Gallup, New Mexico through a brakeman whom the conductor told and who did it pursuant to his instructions. [T. 248, 249.] It was common practice for the employees of respondent to regularly eat their lunch there. [T. 532.] It was the only place in Gallup at which credit was established for petitioner. [T. 280.] For the entire period that he worked as a switchman petitioner ate only at Virgie's Cafe. [T. 272.]

It was conceded that in connection with petitioner obtaining his evening meal the respondent did nothing to avoid the necessity of petitioner to cross the highway or take any action for his protection in his doing so. After knowledge of the prior accident the employer also did not do or say anything to its employees to either warn them of this hazardous condition nor control or prevent the exposure of them to further risk of injury.

The Court of Appeal noted that there was sufficient evidence that this accident to petitioner was both foreseeable and avoidable. In overturning the jury verdict

it ruled that under the law there was no duty on the part of the respondent to take any action for the petitioner's protection. It felt that to constitute a cause of action an off-premise accident must occur not only while the employee was in the performance of an employer's duty but at a place he was required to be in the performance thereof. It found that petitioner was not in the performance of a duty to the employer at the time of his injury. No authority was given as the basis of this finding. No authority was given for the proposition that the injury must occur at a worksite other than a "synthesis" of the cases cited by petitioner where this factor was "emphasized or at least mentioned": *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500 [1 L. Ed. 2d 493]; *Shenker v. Baltimore & Ohio R. Co.* (1963) 374 U.S. 1 [10 L. Ed. 2d 709]; *Van Horn v. Southern Pacific Co.* (1956) 141 Cal. App. 2d 528; *Johnson v. Chesapeake & Ohio Ry. Co.* (1967) 6 Mich. App. 611 [150 N.W. 2d 178].

The Court of Appeal recognized that there was a duty to provide a reasonably safe means of ingress and egress from a place of work but it felt that this rule is limited to premises over which the employer exercises dominion and control. No authority was given for this proposition and the court recognized that it was contrary to the language of *Kooker v. Pittsburgh & Lake Erie R. Co.* (6th Cir. 1958) 258 F. 2d 876 and *Carter v. Union R. Co.* (3d Cir. 1971) 438 F. 2d 208. The Court of Appeal also felt that the risk to which petitioner was exposed was not of a type protected in law. The authority given was *Simpson v. Texas & New Orleans R. Co.* (5th Cir. 1962) 297 F. 2d 660.

REASONS FOR GRANTING THE WRIT.

The Court of Appeal is in error in holding that an employer may not be liable for an off-premise injury unless the employee is required to be at the injury site in the course of his employer's business. Although this factor has been mentioned in the cases cited, in no case has it been made controlling. This barrier to recovery is in violation of petitioner's rights under F.E.L.A. and in conflict with the opinion of this Court in *Atlantic Coast Line R. Co. v. Smalls* (4th Cir. 1954) 216 F. 2d 842 *rev'd on other grounds* (1955) 348 U.S. 946 [99 L. Ed. 740]. There the decision of the intermediate court, determining that there was no evidence from which a jury could justifiably infer negligence on the part of the railroad, was reversed. As there was no written opinion, the Court of Appeal has refused to follow this case although the facts are indistinguishable. The employee was injured in the street by a third-party tortfeasor 200 yards from the station while awaiting transportation to a safety meeting on his day off. It was an off-premise injury and the employee was injured at a place where his duties did not require him to be to perform an assigned task.

This artificial requirement having been resisted in on-premise injury cases should not be introduced in off-premise injury cases. Had Congress intended such a limitation of liability the statute could easily have been drafted to so provide. This Court has stated the guiding principles in construing the Act in *Urie v. Thompson* (1949) 337 U.S. 163, 181-182, [93 L. Ed. 1282, 1299]: "To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording,

the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." Similarly in *Jamison v. Encarnacion* (1930) 281 U.S. 635, 640 [74 L. Ed. 1082, 1085-1086] this Court said: "The act is not to be narrowed by refined reasoning. . . . It is to be construed liberally to fulfill the purposes for which it was enacted. . . ."

In harmony with this general approach to construction of the Act courts have permitted recovery where an off-premise injury did not occur at a place of work and where there was no dominion or control by the employer. The position of the Court of Appeal is contrary to the conflicting decision of this Court in *Shenker, supra,* and the supporting decisions of *Kooker, supra,* and *Carter, supra.* The *Kooker* case clearly states that the duty of the employer is not so circumscribed as to require dominion and control. The *Carter* case noted that where the use of the property by employees of the railroad was in the expectation and intention of the railroad, a duty thereby arose irrespective of lack of dominion and control. This proper test of knowledge of the employer is also seen in the conflicting case of *Martin v. Black* (5th Cir. 1955) 221 F. 2d 567. Here the duty of an employer to provide a safe means of ingress and egress over property not its own was recognized when it had knowledge of and acquiesced in the use of a path by its employees. The rule that knowledge gives rise to a duty has also been applied in the following conflicting cases: *Harp v. Gulf, M. & O R.R.* (1966) 66 Ill. App. 2d 33; 213 N.E. 2d 632; *Ericksen v. Southern Pac. R.R.* (1952) 39 Cal. 2d 374, 246 P. 2d 642 *cert. den.*, 344 U.S. 897 (Knowledge of danger by railroad, not control, is basis for liability); *Panichella v. Pennsylvania R.R.* (W.D.

Pa. 1958) 167 F. Supp. 345; *rev'd on other grounds* 268 F. 2d 72 (3rd Cir. 1959) *cert. den.* 361 U.S. 932 (1960) (Knowingly instructing and permitting laborer to enter area which might prove hazardous); *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 33 U.S. 821 [92 L. Ed. 1108] (Duty to do what a reasonable and prudent person would ordinarily have done under the circumstances where the employer knows or in the exercise of ordinary care ought to know, that an employee is exposed to danger).

An analogous situation is the *Jones Act* case of *Hamilton v. Marine Carriers Corporation* (1971) 332 F. Supp. 223. Here the question in an off-premise accident was not whether the injury occurred in an area where the employer exercised dominion or control, but rather what the connection of the activity involved was with the business of the employer. It concluded that the non-delegable duty to furnish a safe means of egress and ingress extended 250 to 300 feet from the place of employment. At this distance from the ship, the court found that as to an employee returning from lunch the employer owned a duty to use reasonable care to inspect for hazards and to take reasonable precautions to protect its employees. It based its decision on *Shenker, supra,* and *Carter, supra.*

In finding that petitioner was not in the performance of a duty to his employer when injured, the Court of Appeal erred. In none of the cases relied upon by the court for this conclusion was there a requirement that the injury must occur while the employee was engaged in an actual act of work. The activity petitioner was engaged in was within the scope of his employment and he was thus deemed to be rendering service while so engaged. An employee urinating in a loaded gondola

car could not be said to be performing a duty "required" or of being in a place required by his job. *Ringhiser v. Chesapeake & Ohio Ry. Co.* (1957) 354 U.S. 901 [1 L. Ed. 2d 1268] held that the jury could have found from the facts that the employer knew or in the exercise of due care should have known that it was customary for its employees to be in such a location for such a purpose. The same is true in this case.

Further error was made by the Court of Appeal in finding that as a matter of law under F.E.L.A.: "Crossing a highway, even a busy one, is a normal hazard of everyday life, from which his employer had no duty to protect him". No sound legal distinction exists where the injury is foreseeable and avoidable whether it occurs on a public highway or on a pathway which had become slushy and muddy from rain as in *Carter, supra,* or whether bitten by an insect as in *Gallick v. Baltimore & Ohio R. Co.* (1963) 372 U.S. 108 [9 L. Ed. 2d 618], or stung by a bee as in *Pehowic v. Erie Lackawanna R.R. Co.* (3rd Cir. 1970) 430 F. 2d 697, or where inclement weather causes frost bite, *Lindauer v. New York Central Railroad Company* (2nd Cir. 1969) 408 F. 2d 638.

In relying on *Simpson, supra,* as "a case in point" the Court of Appeal was led into error. The authority given for the proposition of no duty in *Simpson,* was *Inman v. Baltimore & Ohio R. Co.* (1959) 361 U.S. 138 [4 L. Ed. 2d. 198]. As the Court of Appeal correctly noted, *Inman* is not directly applicable to the present case nor was it by the same logic applicable to the *Simpson* case. *Inman* stands for the proposition that there was no negligence because of lack of evidence of foreseeability of danger as well as lack of

evidence of any reasonable steps the employer could have taken to avoid the danger. As the petitioner did introduce sufficient evidence to take the case to the jury on the issue of foreseeability and avoidability, the *Simpson* case is not in point. All the court stated was that no decision had been cited nor did it know of any wherein the duty was said to exist. The case was decided in 1962 and since then there have been at least three cases making this duty clear: *Mortensen v. Southern Pacific Company, supra; Johnson v. Chesapeake & Ohio Ry Co., supra,* and *Lane v. Gorman, supra.* Apparently neither of the following applicable prior decisons was brought to the court's attention: *Cahill v. New York, New Haven & Hartford R. Co.* (1955) 305 U.S. 898 [100 L. Ed. 790] and *Atlantic Coast Line R. Co. v. Smalls, supra,* also decided in 1955. The facts here are materially different from those in the *Simpson* case. There the employer did not establish a required route to the extent of placing a walkway on public property and thus encourage its employees to enter into a hazardous area nor was it an ingress case; the accident there occurred some distance away from the place of employment and under unexpected circumstances.

When the Court of Appeal found "no duty" to act on behalf of petitioner's interest, it held in effect that the negligence of the employer was negated because the petitioner assumed the risk of injury from an "accustomed danger". This Court long ago denied the validity of this exemption in *Tiller v. Atlantic Coast Line R. Co.* (1943) 318 U.S. 54 [87 L. Ed. 610]. It stated: 318 U.S. on page 58 [87 L. Ed. on pages 612-613]:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by

> the 1939 Amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' "

There being no authority for the selection of risks protected against by statute none should be imposed by judicial interpretation. *Urie v. Thompson, supra.*

The Court of Appeal did not concern itself with the sufficiency of the evidence on the issue of whether the employer acted with the standard of care of a reasonably prudent person under similar circumstances. Presumably this was sufficient for a jury question. It based its decision squarely on the proposition that there was no obligation to so act with respect to the petitioner. As pointed out by *Prosser*, Torts (4th ed. 1971) § 53, p. 325: "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct". This Court has established that in F.E.L.A. cases where an employee is endangered in the course of this employment, there is an obligation to do what a reasonably prudent person would do under similar circumstances. *Anderson v. Atchison, Topeka & Santa Fe Ry. Co., supra.*

Petitioner submits that where any proof of negligence, even the slightest, is enough to carry the case to the jury, the setting aside of a jury verdict as in this case constitues an invasion of the function and province of the jury and is a violation of petitioner's rights under the statute and constitution. *Davis v. Baltimore & Ohio R.R. Co.* (1965) 379 U.S. 671 [13 L. Ed. 2d 594].

It is important that the Writ be granted in this matter to avoid an attempt to limit the beneficial aspects of F.E.L.A. by reading into the Act requirements that have not heretofore existed and thereby also limit the right to a trial by jury.

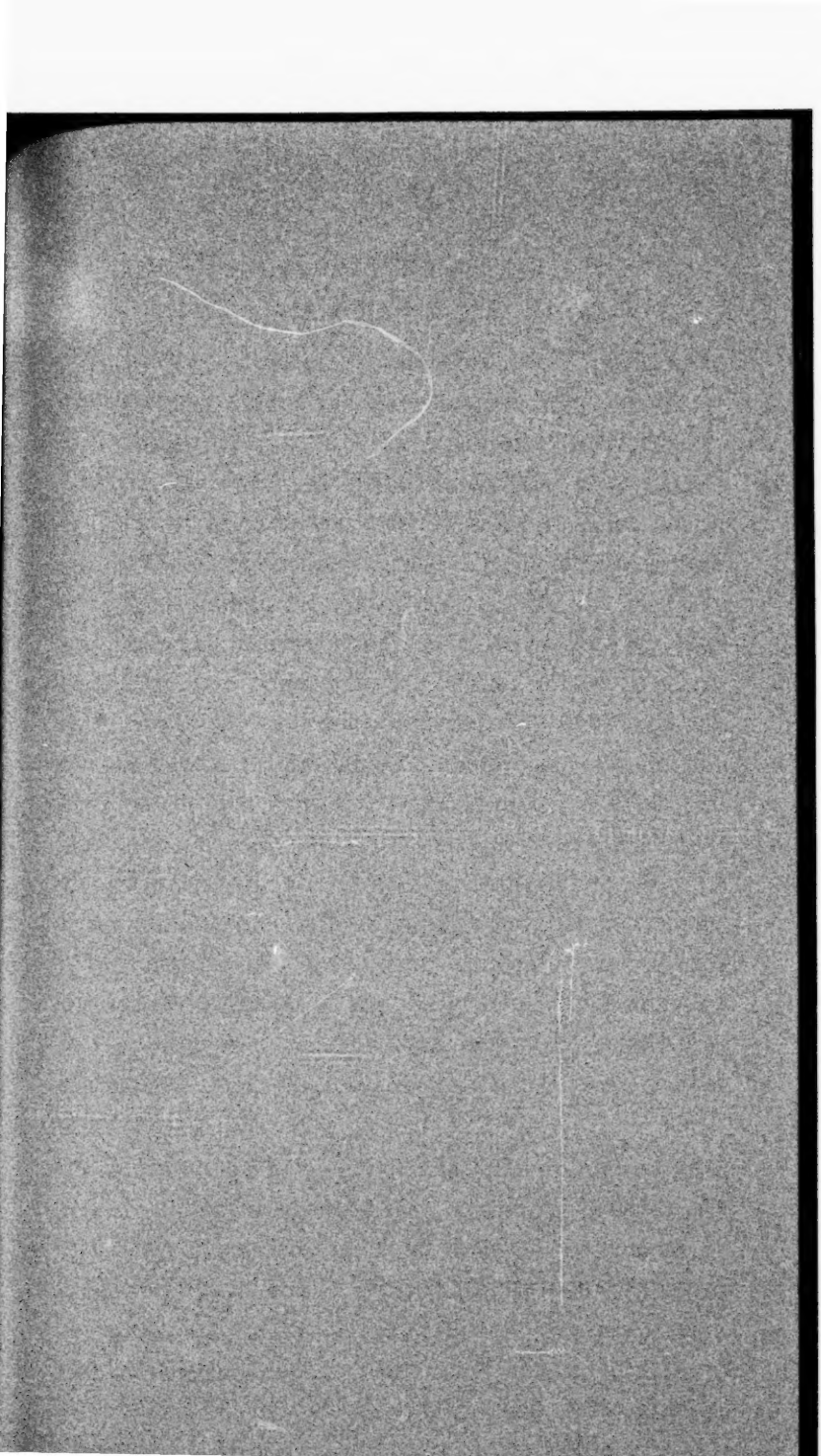
Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROY S. GIORDANO,
Counsel for Petitioner.

June 15, 1973.



APPENDIX A.

45 U.S.C. § 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 54.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

APPENDIX B.

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

Ivan W. Hyatt, Plaintiff and Respondent, v. The Atchison, Topeka and Santa Fe Railway Company, a corporation, Defendant and Appellant. 4 Civil 11904 (Sup.Ct.No. 171112).

APPEAL from a judgment of the Superior Court of Orange County. Robert H. Jacobs, Judge Pro Tem. Reversed.

John J. Balluff, Matthew H. Witteman, and Richard L. Rosett for Defendant and Appellant.

Roy S. Giordano, Inc., and Roy S. Giordano for Plaintiff and Respondent.

Plaintiff (Hyatt), a railroad worker employed by the defendant (railroad), sustained severe personal injuries about 8:00 p.m. on December 8, 1966, when struck by a car operated by a third-party tortfeasor on U.S. Highway 66, in Gallup, New Mexico. At the time of the accident, plaintiff was returning to work after eating "lunch" at a cafe located just across the highway from the railroad yard.

Plaintiff filed this action against the railroad under the Federal Employers' Liability Act (F.E.L.A.) (45 U.S.C., § 51 et seq.) on the theory it failed to provide him with a safe place to work.

In June 1971, a jury found that plaintiff had suffered damages of $110,500, but found that he was 50% contributorily negligent, and rendered a verdict in favor of plaintiff and against the defendant in the sum of $55,250. The railroad's motions for a new trial and

judgment notwithstanding the verdict were both denied, and it appeals from the judgment, as well as the order denying the motion for a new trial[1] and the order denying the motion for judgment notwithstanding the verdict.

At the time of the accident, plaintiff was employed as a switchman at the railroad's yard at Gallup, working the afternoon shift from 3:00-11:00 p.m. It is conceded that his duties involved interstate commerce, thus bringing him within the scope of the Federal Employers' Liability Act.

When plaintiff went to work at Gallup, a fellow brakeman in his crew introduced him at Virgie's Cafe, a place where railroaders commonly ate, and he was given credit there.

During each eight-hour shift the switch crews were allowed twenty minutes for "lunch," and occasionally ten minutes for a coffee break. During lunch and breaks the employees were "on duty" in the sense that they were being paid, and were on call to return immediately if needed in a hurry. The yardmaster decided the time for the break in accordance with the workload of the moment, and informed the foreman of each switch crew, who in turn told his men to go to lunch. It was customary for the men to keep their superiors informed of their whereabouts during the lunch break to facilitate recall, but this custom was not universally followed.

The railroaders could bring bag lunches and eat them in the switchmen's room at the yard office, and many did so. However, there were no food serving or vending facilities on the railroad's premises, so most of the men

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[1]This order is non-appealable (*Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 156).

left the yard to go to lunch. Occasionally one went home to lunch. There was no restriction on where the men went, so long as they got back on time, but most, or at least many of them, customarily ate at Virgie's, one of several cafes across the highway from the yard office.

At the date of the accident, the Santa Fe tracks ran in a generally east-west direction through Gallup, paralleled on the south by U.S. Highway No. 66, a four-lane concrete highway which connected at both edges of town to Interstate Highway No. 40. The yard office was a low building to the north of the tracks. From the office to the curb at the edge of the highway ran a path, constructed by the defendant of railroad ties and asphalt, raised to the level of the top of the rails. In the interests of safety, the employees were required by company rule to use this raised path instead of stepping between the rails. The path was the principal access to the yard office, although there was another entrance leading from a side street to a parking lot behind the office. Directly across Highway 66 from the southerly end of the path, Eighth Street, running north-south, intersected in a tee with the highway. Virgie's was situated on the second lot from the corner, on the west side of Eighth Street. Other eating places were located on the south side of Route 66 to the west of the intersection, including the Paramount Cafe, about 1½ blocks away. The only business on the north side of the highway was a Conoco station a little to the west. Between the tracks and the highway, on both sides of the paved path, was a narrow parking area for railroad employees, apparently outside the railroad's property line. A chain-link fence, erected some years before by the State of New Mexico, but maintained by the railroad,

ran along the property line. From west to east, the fence ran behind the Conoco station and stopped at the path to the yard office, then started again a block away at Seventh Street, which apparently crossed the tracks, giving access to the parking lot behind the railroad office. Betwen the tracks and the east side of the parking lot between the tracks and the highway railroad ties had been driven into the ground every few feet to form a barrier to keep cars off the tracks.

On Thursday, December 8, 1966, plaintiff's crew went to lunch sometime after eight o'clock. The crew was normally made up of four men, but on this night two trainees swelled their numbers to six. Gerald Smith, the foreman, ate his lunch in the switchmen's room at the yard office. Carl Hansen went home to lunch. Plaintiff always ate lunch at Virgie's, and he and the other three went there. They stayed about twenty minutes, then plaintiff and Paul Barin, one of the trainees, started back to the yard.

As they were crossing from the west corner of Eighth Street to the entrance to the yard, they were struck by an automobile driven by a teenager, Jimmie James Fry. Barin, who had been walking to the left of plaintiff, jumped back and, although he was hit, suffered no injuries. Plaintiff was thrown through the air about twenty feet, landing on his back and head. Both of plaintiff's legs were broken, the ligaments were torn from his right knee, resulting in permanent instability of the knee, and he was rendered unconscious by a blow and cut on his head. His ability to do work that requires heavy use of the legs, or climbing, is permanently impaired.

Plaintiff has no memory of the events of the accident; Paul Barin did not testify. The only direct testi-

mony of the accident itself was given by Carl Hansen, who had just parked his vehicle on the south side of the highway and was about to cross Route 66 to return to the yard when the accident occurred. Hansen was about 100 to 150 feet east of Barin and plaintiff. They started across before him. He stepped into the street, but, seeing the Fry car speeding toward him, stepped back on the curb and yelled a warning to Barin and plaintiff. Fry had pulled out of the Paramount Cafe, and his car hit plaintiff just north (on the wrong side) of the center line. Fry's headlights were on. Hansen could not estimate his speed, but Fry was cited for speeding. Plaintiff and Barin were conversing as they were walking across the street. Whether or not the plaintiff looked for traffic before crossing the highway is not clear, but it may be inferred from the jury's finding on contributory negligence that he failed to do so inasmuch as it reduced his award by 50% under the comparative negligence provision of the F.E.L.A.[2]

There was no marked cross-walk at the point where plaintiff was injured. There was a traffic light some blocks to the east, but there were no traffic controls of any kind at the intersection of Eighth Street and Route 66 except a stop sign for cars entering Route 66 from Eighth Street. A photograph in evidence shows a forty-mile-per-hour speed limit sign just west of the Conoco station, for traffic headed west, but none of the witnesses had any memory of that sign or any other speed limit sign in the vicinity of the accident. Although

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[2]"In all actions . . . brought . . . under . . . the provisions of this act . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: . . ." (45 U.S.C., § 53.)

there was a slight bend at the Conoco station, there was a clear, unobstructed view of the highway in both directions from the intersection. Traffic was usually heavy at this point, and it sometimes took up to five minutes to get across the street, but the testimony was undisputed that the traffic on the night of the accident was very light, and there was no evidence of any vehicle other than Fry's on the highway at the time of the accident. The street was well-lighted from the glare of the signs of the commercial buildings, as well as that provided by the modern street lights, set on poles on both sides of the highway, with extensions to place the lights out over the pavement. One of these lights was on the west corner of Eighth Street, at the point where plaintiff started to cross. Another was about ten feet east of the south end of the path to the yard office.

The railroad raises three issues on appeal: (1) The trial court should have granted its motion for a directed verdict, or in the alternative, its motion for judgment notwithstanding the verdict, on the ground that the facts establish as a matter of law that plaintiff was not acting within the scope of his employment at the time of the accident, so as to bring him within the provisions of the F.E.L.A.; (2) even if the plaintiff was within the scope of the coverage of the F.E.L.A., there was as a matter of law no evidence from which the jury could have found that the railroad was negligent, or that any negligence on its part contributed in any way to plaintiff's injuries; and (3) the court committed prejudicial error in admitting hearsay testimony of a prior accident.

SCOPE OF EMPLOYMENT

The railroad contends as a matter of law that the plaintiff, while off the railroad's premises during his lunch break, was not "employed" within the meaning of that word as used in the F.E.L.A.[3] Comparison of the facts of the present case with those of recent F.E.L.A. decisions leads us to precisely the opposite conclusion: the evidence herein establishes as a matter of law that the plaintiff was within the scope of his employment for the purposes of the Act. Certainly the jury was not unreasonable in so finding.

In *Atlantic Coast Line R. Co. v. Smalls* (4th Cir. 1954) 216 F.2d 842, *rev'd on other grounds* (1955) 348 U.S. 946 [99 L.Ed. 740], railroad employees who were struck by an automobile while standing at a railway crossing, on their own time, waiting for a train to take them to a company safety meeting, were held covered by the Act. In *Carney v. Pittsburgh & Lake Erie R. Co.* (3d Cir. 1963) 316 F.2d 277, *cert. den.*, 375 U.S. 814 [11 L.Ed.2d 49], the employee was determined to be covered under unusual circumstances: he was injured when his bed collapsed while he was staying, at the expense of his employer, at a Y.M.C.A., off-duty but on call. The cases demonstrate that an employee, injured on his way to or from work, and near, but not on, the employer's premises, may be covered: (See, *e.g.*, *Carter v. Union R. Co.* (3d Cir. 1971) 438 F.2d 208; *Harp v. Gulf, Mobile & Ohio R. Co.* (1966) 66 Ill.App.2d 33 [213 N.E.2d 632].)

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[3]"Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, ..." (45 U.S.C., § 51.)

In support of its position, the railroad cites three cases in which appellate courts held as a matter of law that railroad employees were not within the coverage of the F.E.L.A. when they suffered injuries: *Garcia v. Atchison, Topeka & Santa Fe Ry. Co.* (1959) 66 N.M. 339 [347 P.2d 1005], *cert. den.*, 362 U.S. 989 [4 L. Ed.2d 1022]; *Atchison, Topeka & Santa Fe Ry. Co. v. Wottle* (10th Cir. 1952) 193 F.2d 628, *app. dism.*, 344 U.S. 850 [97 L.Ed. 661]; *Quirk v. New York, Chicago & St. Louis R. Co.* (7th Cir. 1951) 189 F. 2d 97, *cert. den.*, 342 U.S. 871 [96 L.Ed. 655]. In all of the cited cases, the employees were injured on their own time, outside of working hours, while they were engaged in purely personal activities. That is not the situation here. The plaintiff was "on time," i.e., he was getting paid for his lunch time, and although the evidence was conflicting, the jury could have found that he was "on call" during the lunch break. The fact that he was on a lunch break does not take him out of the scope of his employment (*Virginian Ry. Co. v. Early* (4th Cir. 1942) 130 F.2d 548, 551), nor does the fact that he was taking his lunch break off the employer's premises exclude him from coverage.

In workmen's compensation cases, the rule is well-established that employees are covered while off the employer's premises for meals or coffee breaks. (See, e.g., *Western Greyhound Lines v. Industrial Acc. Com.* (1964) 225 Cal.App.2d 517; *Western Pipe & Steel Co. v. Industrial Acc. Com.* (1942) 49 Cal.App.2d 108.) It has been suggested that the term "while he is employed" used in section 51, 45 U.S.C., should be given *broader* interpretation than the words "arising out of and in the course of his employment" used in compensation statutes. (*Central of Georgia R. Co. v.*

Rush (1970) 286 Ala. 333 [239 So.2d 763, 765], construing the Alabama compensation statute and F.E.L.A.) Given the broad interpretation applied to the F.E.L.A. by the Supreme Court (see e.g., *Reed v. Pennsylvania R. Co.* (1956) 351 U.S. 502 [100 L.Ed. 1366] construing the scope of "employment" under the F.E.L.A., as amended in 1939), we should at least not give to the F.E.L.A. a *narrower* construction than the compensation acts.

Accordingly, we find that at the time of the accident plaintiff was "employed" within the meaning of 45 U.S.C., § 51.[4]

EVIDENCE OF NEGLIGENCE

The railroad's second claim of error is that there was no evidence as a matter of law from which the jury could have inferred that any negligence on its part was a proximate cause of plaintiff's injuries.

Before we discuss the merits of this proposition, some preliminary observations are in order.

All questions arising under the F.E.L.A. must be decided according to federal standards, as laid down by the Supreme Court of the United States. (*Chesapeake & Ohio Ry. Co. v. Kuhn* (1931) 284 U.S. 44 [76 L.Ed. 157]; *Davee v. Southern Pacific Co.* (1962) 58 Cal.2d 572, 575; *Hines v. Industrial Acc. Com.* (1920) 184 Cal. 1, 16 [14 A.L.R. 720] *cert. den.*

[4]Although the trial court submitted this issue to the jury, it would have been proper, under the evidence, to have found as a matter of law that plaintiff was injured while in the scope of his employment, even though there was a dispute as to plaintiff's on-call status, inasmuch as there was no evidence from which it could be inferred that plaintiff, by some purely personal junket, had severed the continuing employment relationship existing during the paid lunch break. (*Cf. Quirk v. New York C. & St. L. R. Co.* (7th Cir. 1951) 189 F.2d 97, 100-101.)

sub nom. Payne v. Industrial Acc. Com., 254 U.S. 655 [65 L.Ed. 459].) Where Supreme Court decisions do not provide answers to questions posed under the Act, we may look for guidance to the decisions of the United States Courts of Appeals and the appellate courts of sister states, but such decisions are in no sense binding on us. (*People v. Bradley* (1969) 1 Cal. 3d 80, 86; 6 Witkin, California Procedure (2d ed. 1971), Appeal, §§ 672-673, pp. 4585-4587.)[5]

The general policy of the F.E.L.A. is to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. (*Dice v. Akron, Canton & Youngstown R. Co.* (1952) 342 U.S. 359, 362 [96 L.Ed. 398, 403].)

The right to a jury trial is part and parcel of the remedy provided injured railroad workers by the F.E.L.A. (*Bailey v. Central Vermont R. Co.* (1943) 319 U.S. 350, 354 [87 L.Ed. 1444, 1448]), and the Supreme Court has repeatedly expressed a strong preference against taking F.E.L.A. cases from the jury.[6] The court's deference to "the basic congressional

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[5]*Keiper v. Northwestern Pacific R. Co.* (1955) 134 Cal. App. 2d 702, 706-707, *cert. den.* 350 U.S. 948 [100 L.Ed. 826], can be interpreted as standing for the proposition that the decisions of the lower federal courts are binding on state courts in F.E.L.A. cases. If this is a correct interpretation of *Keiper*, we decline to follow it on this point. The decisions of the United States Courts of Appeals are not binding on each other; it makes little sense to hold that they are binding on state courts.

[6]SEE, *E.G., Basham v. Pennsylvania R. Co.* (1963) 372 U.S. 699 [10 L.Ed.2d 80], and *Harrison v. Missouri Pacific R. Co.* (1963) 372 U.S. 248 [9 L.Ed.2d 711], both reversing judgments for defendant railroads notwithstanding jury verdicts for plaintiffs; and *Davis v. Virginian Ry. Co.* (1960) 361 U.S. 354 [4 L.Ed.2d 366]; *Conner v. Butler* (1959) 361 U.S. 29 [4 L.Ed. 2d 10]; *Reed v. Pennsylvania R. Co.* (1956) 351 U.S. 502 [100 L.Ed. 1366]; *Wilkerson v. McCarthy* (1949) 336 U.S. 53 [93 L.Ed. 497], all reversing judgments for defendant railroads, entered on directed verdicts or nonsuits.

intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap" (*Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 509 [1 L.Ed.2d 493, 501]) has been so great as to induce Justice Harlan to express a "suspicion that the real but unarticulated meaning of Rogers is that in FELA cases anything that a jury says goes, with the consequence that all meaningful judicial supervision over jury verdicts in such cases has been put at an end." (*Harris v. Pennsylvania R. Co.* (1959) 361 U.S. 15, 27 [4 L.Ed.2d 1, 9] (dissenting opinion); see also *Sinkler v. Missouri Pacific R. Co.* (1958) 356 U.S. 326, 332 [2 L.Ed.2d 799, 804] (Harlan, J., dissenting).)

But even in Supreme Court cases involving the question of employer negligence under the F.E.L.A., jury verdicts are not immune from judicial scrutiny; Justice Harlan's suspicion has not been entirely confirmed. In a case decided the same day as *Rogers,* the same court affirmed a judgment entered on a verdict directed for the ralroad on the ground of insufficiency of the evidence to show negligence. (*Herdman v. Pennsylvania R. Co.* (1957) 352 U.S. 518 [1 L.Ed.2d 508].) In two later cases, the court struck down jury verdicts for plaintiffs, on the ground that the evidence was insufficient as a matter of law to permit the question of the railroad's negligence to be submitted to a jury. (*New York, New Haven & Hartford R. Co. v. Henagan* (1960) 364 U.S. 441 [5 L.Ed.2d 183]; *Inman v. Baltimore & Ohio R. Co.* (1959) 361 U.S. 138 [4 L. Ed.2d 198].)

In F.E.L.A. cases, as in any other, a question of fact may be taken from the jury only if reasonable

men could not reach differing conclusions from the evidence presented. (*Baker v. Texas & Pacific R. Co.* (1959) 359 U.S. 227, 228 [3 L.Ed.2d 756, 758].) When fair-minded men could differ, the question must be left to the jury. (*Davis v. Virginia Ry. Co.* (1960) 361 U.S. 354, 356-357 [4 L.Ed.2d 366, 369]; *Bailey v. Central Vermont R. Co., supra,* 319 U.S. 350, 353.)

The Supreme Court once said, "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." (*Brady v. Southern Ry. Co.* (1943) 320 U.S. 476, 479 [88 L.Ed. 239, 243].) Although *Brady* has never been overruled, it is clear that it is no longer the law on this point, and that the only basis for taking an F.E.L.A. case from the jury is a *complete absence* of probative facts from which the jury may find for the plaintiff. (*Lavender v. Kurn* (1946) 327 U.S. 645, 653 [90 L.Ed. 916, 923].) *Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. 500, and the cases that followed, have made it clear that in F.E.L.A. cases it takes less evidence to get to the jury than in ordinary negligence cases, and that a scintilla is enough. (*Gallick v. Baltimore & Ohio R. Co.* (1963) 372 U.S. 108 [9 L.Ed.2d 618]; *Sinkler v. Missouri Pacific R. Co., supra,* 356 U.S. 326, 332-333 (dissenting opinion, cases cited fn. 1.)

Thus, it has been said that a trial court, under the Supreme Court decisions, is justified in withdrawing a case from the jury only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of the employee. (*Pehowic v.*

Erie Lackawanna R. Co. (3d Cir. 1970) 430 F.2d 697, 699-700.)

Plaintiff cites five Supreme Court decisions, as well as several by the Courts of Appeals and state courts, in support of the jury's finding of negligence in this case: *Anderson v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 333 U.S. 821 [92 L.Ed. 1108]; *Smalls v. Atlantic Coast Line R. Co.* (1955) 348 U.S. 946 [99 L.Ed. 740]; *Cahill v. New York, New Haven & Hartford R. Co.* (1955) 350 U.S. 898 [100 L.Ed. 790]; *Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. 500; *Gallick v. Baltimore & Ohio R. Co., supra,* 372 U.S. 108.

Anderson reversed the Los Angeles County Superior Court's dismissal (affirmed by the California Supreme Court, 31 Cal.2d 117) of a complaint alleging that the railroad was negligent in failing promptly to search for and rescue a conductor who fell from his train, suffering injuries which immobilized him, so that he died of exposure. The case stands for the proposition that the employer has a duty, under F.E.L.A., to take reasonable action to rescue an employee whom it knows, or in the exercise of ordinary care ought to know, is in peril. It has no direct application to this case.

Smalls was a summary reversal of a decision in the Court of Appeals, holding that under the circumstances shown there was no evidence of employer negligence. The case is more fully discussed hereinafter.

In *Cahill* the plaintiff won a jury verdict in the District Court, which was reversed by the Court of Appeals (2d Cir. 1955, 224 F.2d 637), but reinstated by the Supreme Court, granting certiorari and reversing the Court of Appeals by a summary order per curiam.

Plaintiff brakeman was injured when struck by a truck while flagging traffic behind a train stalled in an intersection of busy streets in New Haven, Connecticut; plaintiff claimed that the railroad was negligent in failing to provide him a safe place to work, in failing to issue him proper instructions to enable him to do his job properly, and in sending him to an unsafe place. The majority of a panel of the Court of Appeals held that there was no evidence that the railroad had failed in its duty to take reasonable measures to insure the safety of its employee, and that there was no duty to protect him against the specific accident because it was not foreseeable. As just indicated, the Supreme Court disagreed. The statement of facts in the majority opinion in the Court of Appeals makes clear that, under the standard explicated in *Rogers* two years later,[7] the evidence was clearly sufficient to take the case to the jury. At the very least, the jury could have found that the railroad had been negligent in failing to give adequate instruction to the inexperienced brakeman, who, if adequately instructed, might have avoided the position of peril in which he placed himself while flagging traffic.

Rogers is the leading case on the employee's burden of proof as to negligence in F.E.L.A. cases: A railroad employee was burning grass alongside the right of way when, pursuant to instructions, he stopped to watch for hotboxes, on a passing train; the train fanned the flames, which enveloped the employee, forcing him to retreat; in doing so he fell into a culvert and was in-

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[7]The standard had been foreshadowed by several earlier Supreme Court cases. See, e.g., *Lavender v. Kurn* (1946) 327 U.S. 645 [90 L.Ed. 916]; *Lillie v. Thompson* (1947) 332 U.S. 459 [92 L.Ed. 73]; *Wilkerson v. McCarthy* (1949) 336 U.S. 53 [93 L.Ed. 497]; see also Judge Frank's dissenting opinion in *Cahill,* 224 F.2d at 640.

jured. A jury returned a verdict in his favor. The Supreme Court of Missouri reversed, and was in turn reversed by the Supreme Court, which reviewed the evidence and found that there were "probative facts from which the jury could find that respondent was or should have been aware, of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." (352 U.S. at 503.)

The court held that under the F.E.L.A., "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. . . . [¶] . . . [F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." (Original emphasis.) (footnotes omitted.) (352 U.S. at 507-508.)

In *Gallick* the defendant railroad had negligently permitted a stagnant pool to accumulate beside its right of way for many years, filled and surrounded by dead

and decayed rats and pigeons. Plaintiff spotting crew foreman was bitten by an insect while working on the right of way near the pool. The bite became infected; the infection spread out of control, resulting in the amputation of both plaintiff's legs. Judgment for plaintiff against the railroad was entered on a jury verdict. The Ohio Court of Appeals reversed, finding that there was no evidence of any causal connection between the pool and the bug bite. There being no evidence from which the jury could infer that the railroad's negligence in permitting the pool to accumulate proximately caused the bite and the resulting illness, a verdict should have been directed for the railroad. The Supreme Court reversed, saying there was sufficient evidence to submit the case to the jury under the *Rogers* standard.

Gallick did not announce any new principles. It reemphasized the *Rogers* rule that the F.E.L.A. embodies a very liberal test of causation, far different from common law proximate cause standards. (See *Hausrath v. New York Central R. Co.* (6th Cir. 1968) 401 F.2d 634; *Parker v. Atchison, Topeka & Santa Fe Ry. Co.* (1968) 263 Cal.App.2d 675, holding that it is reversible error to instruct the jury with the common-law definition of proximate cause in an F.E.L.A. case.) What *Gallick* apparently means is that whenever there is evidence from which a jury could find that the employer was negligent, if fair-minded men could infer that the negligence played any part in causing the injuries complained of, then the question is for the jury.

These cases do not lead inevitably to the conclusion that "[u]nder the recent decisions of the United States Supreme Court in F.E.L.A. cases, speculation, conjecture and possibilities suffice to support a jury verdict."

(*Gibson v. Elgin, Joliet & Eastern Ry. Co.* (7th Cir. 1957) 246 F.2d 834, 837, *cert. den.*, 355 U.S. 897 [2 L.Ed.2d 193]; see also Justice Frankfurter's memorandum, *Ibid.*) But it is fair to say that "the strict application of the rule of the *Rogers* case approaches a scheme of workman's compensation, substituting the jury in place of a board of experts and allowing an open-end award in lieu of a fixed statutory amount." (*Mills v. Pennsylvania New York Central Transp. Co.* (1968) 16 Ohio St.2d 97 [243 N.E.2d 99, 103], reversing a judgment entered for defendant on demurrer.)

On the other hand, to say that the F.E.L.A., as interpreted by the Supreme Court, *approaches* a workmen's compensation statute is not to say that it *is* a compensation statute. The history and interpretation of the F.E.L.A. show conclusively that it is *not* a workmen's compensation act, that the element of fault on the part of the employer is necessary to recovery, and that what injured railroaders have won in this legislation is the right to present their claims that the injuries arose *in whole or in part* from the negligence of the employer in a fairly conducted jury trial.[8] (*Davis v. Illinois Central R. Co.* (6th Cir. 1966) 359 F.2d 780, 781-782, and authorites cited.) Stated differently, the railroad is not made an absolute insurer against personal injury damages suffered by its employees while they are on the job. (*Inman v. Baltimore & Ohio R. Co., supra,* 361 U.S. 138, 140; *Wilkerson v. McCarthy*

[8]"Every common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . *resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, . . ." (45 U.S.C., § 51.) (Emphasis added.)

(1949) 336 U.S. 53, 61 [93 L.Ed. 497, 504].) It must be shown that the employer violated some duty owed to the employee. The difference between F.E.L.A. actions and ordinary negligence actions is not in what must be shown, but in the quantum of proof necessary to show it.

What constitutes negligence within the F.E.L.A. is a federal question, to be determined by common law principles as established and applied in the federal courts. (*Urie v. Thompson* (1949) 337 U.S. 163, 174 [93 L.Ed. 1282, 1295, 11 A.L.R.2d 252].) Although the F.E.L.A., as interpreted by the Supreme Court, has modified the common law negligence action by eliminating certain defenses, by relaxing standards of causation, and by reducing the burden of proof imposed on the plaintiff, there has been no modification in the basic elements to be proved: (1) a duty, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a breach of that duty; (3) a causal connection between the breach and the plaintiff's injury; and (4) actual damage. (Prosser, Torts (3d ed. 1964), § 30, p. 146.)

The *sine qua non* of any negligence action is the duty owed the plaintiff by the defendant. If there is no duty it cannot be breached. Whether or not there is a duty is ultimately a question of law. Of course, it is for the jury to decide whether there are facts which give rise to an inference that the relationship between plaintiff and defendant is such that the latter must use due care to prevent harm to the former, and in F.E.L.A. cases if there is *any* evidence from which reasonable jurors could infer that a duty imposed by the law exists, then the question must be reserved for the

jury. We conclude that on the record before us there was no evidence from which it could be reasonably inferred that the defendant owed a duty of due care to prevent the accident that befell the plaintiff.

The duty invoked by the plaintiff in the case at bench is the non-delegable duty of an employer to exercise due care to provide his employees with a reasonably safe place to work. (*Shenker v. Baltimore & Ohio R. Co.* (1963) 374 U.S. 1, 7 [10 L.Ed.2d 709, 714]; *Ellis v. Union Pacific R. Co.* (1947) 329 U.S. 649, 652 [91 L.Ed. 572, 576].) This duty is not confined to the precise spot at which an employee is required to perform his principal tasks. (*Anderson v. W. R. Chamberlin & Co.* (1956) 142 Cal.App.2d 591, 610-611.)[9] The Supreme Court found the duty to extend to a railroader who, while urinating in a loaded gondola car, was injured when the load shifted. It was held that the jury could have found from the facts that the employer knew or in the exercise of due care should have known that it was customary for employees to use such cars for such purposes. (*Ringhiser v. Chesapeake & Ohio Ry. Co.* (1957) 354 U.S. 901 [1 L.Ed. 2d 1268]; see discussion in *Golden v. Reading Co.* (E.D. Pa. 1957) 160 F.Supp. 155, 156, *aff'd.* (3d Cir. 1958) 253 F.2d 567.) The duty extends to protection of employees against tortious or criminal acts of third parties, if such acts are reasonably foreseeable by the employer. (*Lillie v. Thompson* (1947) 332 U.S. 459, 461 [92 L.Ed. 73, 75].)

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[9]Decided under the Jones Act (46 U.S.C. § 688), which incorporates as to seamen the provisions of the F.E.L.A. Standards of liability under the two acts are the same. (*Ferguson v. Moore-McCormack Lines* (1957) 352 U.S. 521, 523 [1 L.Ed.2d 511, 514].)

When the employee is required by his duties to be on the premises of customers of his employer, the duty extends to him, even though the premises are not under the dominion and control of the employer. (*Shenker v. Baltimore & Ohio R. Co., supra,* 374 U.S. 1, 7; *Van Horn v. Southern Pacific Co.* (1956) 141 Cal.App.2d 528, 532.)

The railroad distinguishes *Van Horn* and similar cases on the ground that they involve private premises, whereas the accident in the case at bench occurred on a public highway over which no private party has control. The distinction is unsound. Had the plaintiff in *Van Horn* been injured on a United States military reservation while doing his job (noting the serial numbers of tank cars parked on the customer's spur), rather than on the private property of Standard Oil Co., the same result would have been required. (See *Terminal Railroad Association of St. Louis v. Fitzjohn* (8th Cir. 1948) 165 F.2d 473 [1 A.L.R.2d 290] (United States ordnance depot).)

Plaintiff relies more heavily, however, on cases in which railroad employees have been allowed to recover for injuries inflicted by third parties on the public highways: *Mortensen v. Southern Pacific Co.* (1966) 245 Cal.App.2d 241; *Johnson v. Chesapeake & Ohio Ry. Co.* (1967) 6 Mich.App. 611 [150 N.W.2d 178]; see also *Lane v. Gorman* (10th Cir. 1965) 347 F.2d 332. (*Sleeman v. Chesapeake & Ohio Ry. Co.* (6th Cir. 1969) 414 F.2d 305, also relied upon by plaintiff, involved an accident in a parking lot owned and maintained by the railroad.)

In *Mortensen* the employee's duties required him to drive company engineers on inspection trips. During

one such trip, while he was driving a ¾-ton pickup truck, his vehicle was struck from behind by a drunk driver, who was ultimately convicted of manslaughter. The employee was thrown from the truck and suffered fatal injuries. Of the two passengers, one was also thrown from the truck and was severely injured; the other remained in the truck and received relatively light injuries. Experts gave considerable testimony from which the jury could have inferred that use of seat belts might have saved the employee's life. The railroad's safety department had been recommending the installation and compulsory use of seat belts, at relatively minor expense, for the past six years; the year following the accident, the railroad installed seat belts in its entire fleet of motor vehicles of one ton or less. The court, reversing a judgment of nonsuit for the defendant, held that this was more than sufficient evidence to take the case to the jury on the issues of negligence and causation.

In *Johnson* the plaintiff, a member of a track repair gang, was returning from the broken track to the work truck to get tools to continue the job when he was struck by a car driven by a third party on a public highway at night. The evidence showed that the company had taken no safety precautions whatever with regard to protecting the work gang from traffic on the highway where they were working. The Michigan Court of Appeals affirmed a judgment entered on a jury verdict for plaintiff.

All of these cases contain one or both of two vital factors, neither of which is present in the case at bench: (1) either the employees were injured on the premises of their employers which the employers had a primary duty to maintain in safe condition; or (2) they were

injured while in the performance of their duties. In either case, the source of the employer's non-delegable duty to provide a safe place to work is plain: the place is in fact, with reference to the injured employee, a place of work. This factor has been emphasized, or at least mentioned, in the cases relied on by plaintiff: *Rogers* refers to the "likelihood that [the employee] in *performing the duties required of him,* would suffer just such an injury as he did." (*Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. 500, 503.) "[A] railroad has the nondelegable duty to provide its employees with a safe place to work even *when they are required to go* onto the premises of a third party over which the railroad has no control." (*Shenker v. Baltimore & Ohio R. Co., supra,* 374 U.S. 1, 7.) The duty to furnish a safe place to work "extends to premises of a third party *where the employee is sent by the employer to work.*" (*Van Horn v. Southern Pacific Co., supra,* 141 Cal. App.2d 528, 532.) *Johnson v. Chesapeake & Ohio Ry. Co., supra,* 6 Mich.App. 611 [150 N.W.2d 178, 179], in finding a duty in the defendant, relies on *Rogers* and *Beattie v. Elgin, Joliet & Eastern Ry. Co.* (7th Cir. 1954) 217 F.2d 863, which held the defendant railroad liable, "[i]nasmuch as plaintiff at the time of the accident was in a place *where his assigned duties required him to be,* . . . ." (217 F.2d at 866.) (Emphasis added in each case.)

Although they sometimes use very broad language ("[T]he controlling question today is whether the railroad could reasonably have anticipated that its employees might be on the spot where an injury occurs." (*Golden v. Reading Co., supra,* 160 F. Supp. 155, 156)), the cases extending the duty to provide a safe place to work beyond the employee's work site can all

be explained as the Fifth Circuit Court of Appeals did recently: "It is undisputed that the injury occurred on the railroad's property, *all* of which the railroad has a duty to inspect and maintain." (*Almendarez v. Atchison, Topeka & Santa Fe Ry. Co.* (5th Cir. 1970) 426 F.2d 1095, 1099.) (Original emphasis.)

The safe-place-to-work rule also requires the employer to take reasonable steps to provide a reasonably safe means on ingress to and egress from the place of work. (*Kimbler v. Pittsburgh & Lake Erie R. Co.* (3d Cir. 1964) 331 F.2d 383, 385-387 (plaintiff fell on icy steps, the only way in and out of her office).) But this rule has not been extended beyond the premises over which the employer exercises dominion and control, the language in *Kooker v. Pittsburgh & Lake Erie R. Co.* (6th Cir. 1958) 258 F.2d 876 and *Carter v. Union R. Co., supra,* 438 F.2d 208 notwithstanding.

Kooker reversed a judgment entered by the district court on a directed verdict for the defendant. The plaintiff had slipped and fallen on a path which crossed the tracks of another railroad, on his way from the parking lot to his job site. There was evidence that the railroad had maintained the path. The directed verdict was rendered solely on the ground that the path was not the property of the railroad, which had no duty to maintain in safe condition the property of another railroad, despite habitual use by its own employees. Reversal was based on a finding that there was sufficient evidence to present a jury question whether the railroad exercised dominion and control over the path. (258 F. 2d at 878.) The court then went on to observe that the safe-place-to-work rule has been extended to premises over which the employer does not exercise dominion and control, but each of the six cases cited to support

this proposition involved third-party premises where the employee was required to be to do his job. (Cases cited at 258 F.2d 878.)

In *Carter* the employee was injured while enroute between the shanty where he was to pick up his train and the General Motors parking lot, used by railroad employees by agreement between the railroad and General Motors. The court held that General Motors was the agent of the railroad for F.E.L.A. purposes (see *Sinkler v. Missouri Pacific R. Co., supra,* 356 U.S. 326; *Carney v. Pittsburgh & Lake Erie R. Co., supra,* 316 F.2d 277), and emphasized the agreement by which the railroad, in consideration of the use of the lot by its employees, undertook to indemnify General Motors for any personal injury claims arising from use of the lot. Judgment on a directed verdict for defendant was reversed.

Synthesis of the safe-place-to-work cases yields the principle that the employer's continuing non-delegable duty of due care to provide a reasonably safe place to work is not owed to employees when they are neither on the employer's premises nor in a place where they are required to be in the course of the employer's business.

Smalls v. Atlantic Coast Line R. Co., supra, does not compel a different conclusion. *Smalls* was one of three railroaders who won judgments against the railroad on jury verdicts in the district court. The Fourth Circuit Court of Appeals reversed, holding that although the evidence showed that the men were covered by the provisions of the F.E.L.A., there was no evidence from which the jury could infer negligence on the part of the railroad. (216 F.2d 842.) The Supreme Court granted certiorari and reversed the Court of Ap-

peals in a summary order per curiam. (348 U.S. 946, 99 L.Ed. 740.) Three justices dissented.

The short opinion of the Court of Appeals is the only published account of the facts in *Smalls*. The railroad invited, but did not require its employees at Jacksonboro, South Carolina to attend a safety meeting in Florence on Saturday, March 28, 1953. Saturday was not a working day for the men, and they were not to be paid for their time at the meeting, but were to receive free transportation and food. They were to be picked up by one of the company's trains, which did not normally stop at Jacksonboro, at four o'clock on Saturday morning. Fourteen men were gathered at a grade crossing 200 yards from the station about 3:45, when some of them were struck by an automobile driven by a third party. Neither the station nor the crossing was lighted. The railroad had not directed them to stand at the crossing. The theory on which the case was submitted to the jury was that the railroad was negligent in failing to provide a safe place to work, in that it did not light the crossing.

Although this case could conceivably be interpreted as standing for the proposition that the employer owes his employee a duty to provide a safe place to "work" when he is neither on the premises nor in a place where his duties require him to be, that conclusion is not inevitable. The Court of Appeals found no evidence of negligence; the Supreme Court evidently concluded that a reasonable jury could find some negligence in the facts of the case, but the precise rationale for the result does not appear. To us, it seems most likely that the majority of the Court were of the opinion that a reasonable jury could have inferred from the given facts that the "invitation" to the safety meeting carried

with it a certain element of compulsion. It would not be unreasonable to draw that inference from the fact that fourteen men were gathered before four o'clock in the morning, on their day off, to attend an all-day company function without pay. The Court might have concluded that the jury could have found the railroad negligent in failing to discharge its duty to the public at large to make the crossing reasonably safe. Possibly reversal was based on some evidence in the record which the Court of Appeals considered of too little importance to mention in its opinion. We do not know. Since the basis for the decision is purely a matter of conjecture, we cannot accord it any weight as precedent.

Implicit throughout this discussion has been the notion that although plaintiff was within the scope of his employment while he was crossing the highway on his way back from lunch, so as to be covered by the F.E.L.A., he was neither on the railroad's premises, nor in a place where his duties required him to be. Plaintiff argues that the evidence shows that the railroad required him to take his lunch break at Virgie's; the evidence shows nothing of the kind. In his opening statement to the jury, plaintiff's attorney said the evidence would show that the railroad arranged credit for plaintiff at Virgie's and that plaintiff, in consequence, felt obligated to eat there. No such evidence was forthcoming at the trial. Plaintiff testified that he invariably ate at Virgie's, but that he was free to eat any place he liked. He did not testify that he felt obligated in any way to eat there. Plaintiff testified that credit at Virgie's was arranged for him by another brakeman in June of 1966, when he first came to work for the railroad at Gallup. Plaintiff's attorney, in colloquy with the court and counsel for the railroad, said

he would show that there was a regular pattern of the railroad establishing credit for its men at Virgie's. He introduced no evidence whatsoever to this effect. The evidence actually produced showed no more than that many of the men ate at Virgies, and that some of them had credit there, but that some did not. The testimony of plaintiff and other witnesses was undisputed that there were many places where the men ate, and that there was no restriction whatsoever on where they ate so long as they got back to work on time. There was simply no evidence from which the jury could reasonably infer that plaintiff was required by the railroad to take his lunch breaks at Virgie's.

Plaintiff also argues that the railroad was obligated to provide lunch facilities on the premises, inasmuch as it was unsafe to cross the highway. A similar claim was made before the Fifth Circuit Court of Appeals. The plaintiff alleged that her employer had "directed" her to take a fifteen-minute coffee break, that there was no coffee on the premises, so that she was compelled to cross the street to a refreshment stand. On her way back, she fell and was injured due to the unsafe condition of a temporary walkway provided by third parties who were paving the street. The district court dismissed the complaint for failure to state a cause of action. The Court of Appeals affirmed, saying, "We reject as without support in law or in reason the argument that the employer was obligated to provide a coffee break and the argument that, having granted the gratuity, it was under duty to provide the refreshments on its premises." (*Brazier v. Great Atlantic & Pacific Tea Co.* (5th Cir. 1958) 256 F.2d 96, 98.)

Assuming for the sake of argument that the railroad did owe plaintiff a duty to keep him safe while he was

off the premises on his lunch break, the duty is not absolute. (*Atlantic Coast Line R. Co. v. Craven* (4th Cir. 1950) 185 F.2d 176, 178, cert. den., 340 U.S. 952 [95 L.Ed. 686].) Crossing a highway, even a busy one, is a normal hazard of everyday life, from which his employer had no special duty to protect him.

Simpson v. Texas & New Orleans R. Co. (5th Cir. 1962) 297 F.2d 660, is a case in point. The Court of Appeals affirmed a judgment of dismissal for failure to state a cause of action under the F.E.L.A. The plaintiff was a messenger for the railroad. When the motorcycle provided him by the company broke down, he was instructed by his superior to use public transportation to continue his mail run. He took a bus. Upon alighting from the bus in a heavy rain, he was struck by an automobile while crossing the street. The court said, ". . . plaintiff's injuries were caused by an ordinary automobile accident which may have been unavoidable, or may have resulted from the negligence of the automobile driver, the negligence of the plaintiff, or both—but clearly not from the negligence of the defendant railroad. To hold that defendant should have shielded plaintiff from ordinary traffic hazards is tantamount to making it an insurer. The Act does not make the railroad company an insurer against personal injuries to its employees." (297 F.2d at 662.) The court continued, "No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results from the action of some third person. To the contrary is the recent decision of Inman v. Baltimore & O. R. Co., supra." (*Ibid.*)

Inman v. Baltimore & Ohio R. Co., supra, 361 U.S. 138, is the case upon which the railroad relies most heavily on appeal, as it has throughout this litigation. In that case the plaintiff, a railroad crossing watchman, was injured when a drunk driver careened through the intersection, ignoring a stop sign and plaintiff's signals, as well as violating other traffic rules, and struck plaintiff from behind while he was flagging traffic for a train about midnight. The Supreme Court affirmed a judgment of the Ohio Court of Appeals reversing a judgment on a jury verdict for the plaintiff. The jury had specially found that the railroad was negligent in that it had failed to afford "enough protection" to the watchman. The Supreme Court held that there was not enough evidence of negligence on the part of the railroad to submit the question to the jury under the standard laid down in *Rogers.* Particular reliance was placed on the fact that plaintiff had worked at the same crossing for seven years without accident, and that there was no evidence of previous accidents, or any other evidence that the intersection was especially dangerous except one witness' remark, "like a lot of them I seen there, jumping the gun." In other words, the accident was not foreseeable. (See *Gallick v. Baltimore & Ohio R. Co., supra,* 372 U.S. 108, 117.)

Inman is not directly applicable to the present case. In *Inman* there was no question that the railroad owed the employee a duty of due care to provide him a safe place to work. Here we have determined that no duty was owed plaintiff while crossing the public highway. The *Inman* decision rested on a finding that the duty had not been breached—that there was no negligence because of lack of evidence of foreseeability of danger (see above) and lack of evidence of any rea-

sonable steps the employer could take to avoid the danger. (See concurring opinion of Justice Whittaker, 361 U.S. at 142.) Plaintiff in this case did introduce sufficient evidence, under the very relaxed F.E.L.A. standard, to take his case to a jury on the issues of foreseeability and avoidability, provided he had shown that the railroad had a duty to take any action. We have found that no duty of due care can be inferred from the evidence in the case under review.

As an additional basis for liability plaintiff urges in his brief, as he did in argument to the jury, that the testimony of Hansen (plaintiff's fellow-worker) shows that he was negligent in failing to give plaintiff timely warning of the approach of Fry's automobile, and that such negligence must be imputed to the railroad. Plaintiff cites no authority for this novel proposition, presumably because there is none. The common-law rule that there is no duty in the law to warn one who is walking into the jaws of peril (Prosser, Torts (3d ed. 1964), § 54, p. 336, at fn. 49) admits of only a few exceptions. One such exception is the non-delegable duty of an employer to warn his employees of dangers connected with the work of which the master knows, or in the exercise of reasonable care should know, and of which the servant might reasonably be expected to remain ignorant if not warned. (*Ibid.*, § 80, p. 548; Rest., 2d Agency, § 492, 496.) This principle has been applied in cases in which the specific duties of an employee are such that he cannot look out for himself, and must depend for protection

on warning by fellow-employees charged with a duty to warn him. (*Bassett v. New York, Chicago & St. Louis R. Co.* (3d Cir. 1956) 235 F.2d 900 (F.E.L.A. case); *Carey Reed Co. v. McDavid* (5th Cir. 1941) 120 F.2d 843 (common-law negligence case—non-delegable duty to warn held to defeat employer's fellow-servant rule defense).)

For the duty to arise, it must appear that the plaintiff's duties are such that he cannot by the exercise of ordinary care detect the danger; that his fellow employee has, or in the exercise of ordinary care should have, knowledge of the danger; and that the fellow employee, by virtue of either a superior or supervisory position with relation to the plaintiff, or because of his own assigned duties, has a specific duty to impart his knowledge of danger to the plaintiff. The circumstances were all present in *Bassett* and *McDavid;* none of them is present here. The evidence is uncontradicted that Hansen did in fact shout a warning to Barin and plaintiff, and that Barin, at least, responded by jumping back. Assuming for the sake of argument that the jury could have found that Hansen did not give his warning as soon as he became aware of the danger (a finding that in our opinion would be founded on merest surmise), there is still no evidence from which the jury could infer negligence under the rule here discussed: plaintiff's duties did not require him to cross the highway; by the exercise of ordinary care he could have seen the danger for himself; and Hansen was not charged with any specific duty to give a warning.

EVIDENCE OF PRIOR ACCIDENT

The railroad complains that hearsay evidence of a prior accident was admitted without sufficient showing of similarity of the circumstances of that accident and this one.

Our disposition of the negligence issue makes it unnecessary to reach this question, but we note that the evidence complained of was not hearsay (Evid. Code, § 1200; *Gilbert v. Pessin Grocery Co.* (1955) 132 Cal.App.2d 212, 216), and that in F.E.L.A. cases questions of the admissibility of evidence must normally be left to the sound discretion of the trial judge. (*Lavender v. Kurn, supra,* 327 U.S. 645, 654.)

The judgment is reversed with directions to the superior court to enter a judgment for defendant notwithstanding the verdict. (Code Civ. Proc., § 629.) The purported appeal from the order denying the motion for a new trial is dismissed.

/s/ Kerrigan, *J.*

We concur:

/s/ Tamura, *Acting P. J.*

/s/ Kaufman, *J.*

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102
March 21, 1973.

Dear Sir: I have this day filed Order HEARING DENIED.

In re: 4 Civ., No. 11904, Hyatt vs. Atchison, Topeka & Santa Fe R.R.

Respectfully,
G. E. BISHEL
Clerk

Appendix C. Hearing Denied Dated March 21, 1973 35

JUL 18
MICHAEL RODAK

IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1706

IVAN W. HYATT,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

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IVAN W. HYATT,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

Questions Presented.

1. By pleading a cause of action under the Federal Employers' Liability Act, does the plaintiff acquire an absolute right to have issues submitted to a jury, unfettered by any judicial review of the evidence offered in support of his cause?

2. Does the plaintiff establish a *prima facie* case under the Federal Employers' Liability Act by showing that while on a lunch break and in the middle of United States Highway 66 he was struck and injured by a reckless driver?

Statement of the Case.

The petitioner's statement of the case is more argumentative than factual. This is perhaps understandable, since the essential facts which are not in dispute do

not favor his cause against the respondent. In view of the omissions and inaccuracies in the petitioner's statement, however, it becomes necessary to give some account of the facts which are supported by the evidence in the record.

The case involves injuries to a railroad worker who was struck by a reckless driver in the middle of U.S. Highway 66 in Gallup, New Mexico, at the intersection where 8th Street terminates at said highway, on December 8, 1966 at approximately 8:00 p.m.

At the time of the accident a speeding motorist, James Fry, speeding in an easterly direction on Highway 66 in the eastbound lane closest to the center of the highway with his headlight on, struck Mr. Hyatt who was in the process of crossing Highway 66 in a northerly direction, while on his lunch break. Next to petitioner at this time was a fellow worker. [T. 587-588, lines 14-26, 1-15; T. 572, lines 7-20, Vol. III, T. 121-122, lines 11-15, 1.] At approximately the same time, Mr. Carl Hanson, another fellow worker, was standing approximately 100 or 150 feet east of the scene of the accident stepping into the street and then back out of the street and yelling at the petitioner of the approaching speeding vehicle [T. 570-571, lines 17-26, 1; T. 577, lines 15-22.]

Prior to the accident, petitioner had been eating lunch on the south side of U.S. Highway 66 at a cafe known as Virgie's. [T. 294-295, lines 12-14, 9-10, 17-19.] Petitioner had been given his normal 20 minute break for lunch and was on his lunch break when the accident occurred. [T. 294. lines 3-14.]

On the premises of the railroad's yards there was a yard office which was located north of U.S. Highway

66 and there was a walkway from that yard office which the employees used to get to it and to walk to U.S. Highway 66 and parking areas. [T. 613, lines 8-21.] The starting point of the closest fence north of U.S. Highway 66 and on the east side of the walkway was 150 feet. From that point the fence extended to the east. Between that point and the walkway was a parking lot which was also between the railroad tracks and the north edge of U.S. Highway 66. The closest starting point of a fence west of the walkway and north of U.S. Highway 66 was at approximately the westerly edge of the walkway and that continued in a westerly direction. Between that fence and the highway and immediately adjacent to the west of the walkway was a parking area and beyond that to the west a gas station. [T. 262-269.] On the south side of Highway 66 and to the west of 8th Street, starting approximately 100 feet west of 8th Street, were approximately four eating places with the Golden Lion being the most easterly one and the Paramount being the most westerly one. [T. 262-269.] Virgie's Cafe was on 8th Street and about 150 feet south of Highway 66. [T. 262-269.] (See diagram in Appendix A based upon petitioner's Exhibits 6-9 in evidence at the trial.)

Prior to the accident occurring Mr. Fry, the driver of the automobile which struck petitioner, had left the parking area at the Paramount Cafe which was ¼ mile plus from the scene of the accident, which distance was also considered to be a block and a half. [T. 573, lines 8-12; T. 543, lines 12-15.]

The railroad's employees were given a 20 minute break for their lunch period each day that they worked. [T. 294, lines 3-5.] On this lunch break the men would

eat or not eat as they desired. [T. 631, lines 23-26.] Further, the men would eat wherever they desired. Some went home to eat [T. 602, lines 18-20], others ate on the company's premises in a switchman's room [T. 552, lines 9-21, T. 597, lines 18-22], and still others would go across Highway 66 to eat at the cafes on the south side of the street. [T. 560, lines 5-14, 22-25, T. 624, lines 12-18.] Pursuant to a labor-management contract the employees were paid during the time they were on their lunch break. [T. 641, lines 21-25.]

No evidence was admitted at the trial proving the railroad established credit for petitioner at Virgie's Cafe. [T. 420-435.] Furthermore, the traffic on the night of the accident was very light [T. 610, lines 7-13] and the automobile involved in the accident was the only one in the general vicinity of the accident when it occurred and just prior to it occurring. [T. 572, lines 9-13.]

Contrary to petitioner's statement of facts the railroad was not aware that a prior accident had occurred in the area where the petitioner was injured. [T. 643-644, lines 21-24, 1-24; T. 655-656, lines 24-26, 8-12; T. 656, 657, lines 19-23, 2-7; Vol. III, T. 48-49, lines 17-20, 8-15.] The only evidence admitted on this point was hearsay testimony without proper foundation of the plaintiff and one other fellow employee. [T. 392, lines 1-12; T. 565, lines 10-26.] However, the fellow employee had heard that the accident had occurred down near the Paramount Cafe which was ¼ mile or more from the place where the petitioner was injured. [T. 565, lines 10-26.] It should be noted that the California Court of Appeal did not completely address itself to the correctness or incorrectness of the trial court's admitting this evidence at the trial.

ARGUMENT.

1. The Petitioner Was Not Entitled to Have His Case Submitted to a Jury Because He Presented No Evidence of Railroad Negligence.

The petitioner seems to feel that by pleading a purported cause of action under the Federal Employers' Liability Act (FELA) he acquires an absolute and inalienable right to have issues submitted to a jury. He claims that he has been deprived of this "right" because the Court of Appeals has examined the record to see whether there is any evidence to support his cause. While his present quarrel is with the Court of Appeals and the Supreme Court of California, he would undoubtedly have asserted a similar claim of deprivation had the trial court correctly performed its duty by directing a verdict for the defendant or granting a motion for nonsuit. In short, the petitioner seeks to preclude *any* judicial review of the sufficiency of the evidence.

Despite any contrary illusions which the petitioner may hold, there is no law which permits any plaintiff to recover damages upon mere allegations of negligence without proof to support them. The right of a plaintiff to have a jury decide his case arises only when *evidence* is produced to sustain his claim.

It is and has always been the function and the duty of the courts to determine whether there is sufficient evidence to be submitted to a jury. And it is well settled that in making this determination, the courts do not invade the province of the jury nor deprive a plaintiff of his constitutional right to a trial by jury. *Com-*

missioners of Marion County v. Clark, 94 U.S. 278, 284; *Baltimore & Ohio R. Co. v. Groeger,* 266 U.S. 521-524; *Gunning v. Cooley,* 281 U.S. 90, 94; *Galloway v. U.S.,* 319 U.S. 372.

The standard to be applied in reviewing the sufficiency of the evidence in casess arising under the Federal Employers' Liability Act has been enunciated in the decision in *Rogers v. Missouri Pacific R. Co.,* (1957) 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493, where the court said, at pages 506,507:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

It has been held repeatedly that there must be more than a mere breath of evidence which tends to show negligence on the part of the railroad for the jury to be left to decide the case. In other words, the weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact. *Chesapeake & Ohio Railway Company v. Burton,* (1954) 217 F. 2d 471, 473; *Gulf, M. & O. R. Co. v. Joiner,* (1947) 29 So. 2d 255, 260.

The Court of Appeals has scrupulously followed these principles in making an appraisal of the proofs offered in this case and has reached the only reasonable conclusion, *i.e., that there was no negligence on the part of the defendant.*

2. The Petitioner Has Not Established a Prima Facie Case Under the Federal Employers' Liability Act by Showing That While on a Lunch Break and in the Middle of U.S. Highway 66 He Was Struck by a Reckless Driver.

It should be emphasized that there is no dispute whatever in this case as to the manner in which the petitioner was injured. Therefore, whether the Court of Appeals accurately or inaccurately stated the precise location of the accident is of no consequence. A diagram similar to the one in Appendix A showing the location where the accident occurred was submitted to the Court of Appeals in Appellant's Opening Brief.

The Court of Appeals' opinion is a scholarly analysis of all of the relevant "safe place to work" decisions under the FELA. The analysis of those decisions, which are the *same ones* cited in the Petition for a Writ of Certiorari, except for the Jones Act case, disclosed that all of the cases contained one or both of two vital factors, neither of which existed in the present case:

> "(1) Either the employees were injured on the premises of their employers which the employers had a primary duty to maintain in safe condition; or
>
> (2) They were injured while in the performance of their duties."

The Court of Appeals therefore concluded that a:

> "Synthesis of the safe-place-to-work cases yields the principal that the employers continuing non-delegable duty of due care to provide a reasonably safe place to work is not owed to employees when they are neither on the employer's premises nor in a place where they are required to be in the course of the employer's business."

Contrary to several of the contentions in the Petition, all of the cases did contain one or both of the two vital factors found. Petitioner has in this regard, as he has done throughout the pendency of this lawsuit, before all the courts hearing it, attempted to mislead this court as to the actual facts of those cases in terms of the law expressed therein. A good example of this approach is petitioner's citation to *Ringhiser v. Chesapeake & Ohio Ry. Co.*, (1957) 354 U.S. 901, 1 L.Ed. 2d 268, re the second factor where the facts of the case clearly fall within the first factor. The Court of Appeals' decision saw through petitioner's approach.

In 1959 after the *per curiam* decision without opinion in *Atlantic Coast Line Railroad Company v. Smalls*, (4th Cir. 1954) 216 F.2d 842, cert. granted 348 U.S. 946, *Inman v. Baltimore & O. R. Co.*, 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed. 2d 198, was decided by the United States Supreme Court. In that case the court held that the evidence was insufficient to show negligence in any manner on the part of the railroad. *Inman* involved facts where a railroad employee was injured when struck in the middle of a street by a reckless driving motorist when he was required to stand in the middle of a street at a railway grade crossing to flag traffic even though automatic crossing protection was existent and working at the crossing.

Petitioner's contention, that an injury need not occur at a place of work, would if followed to its ultimate logical conclusion, by itself, lead to preposterous results. For example, an employee may go on his lunch break into a liquor store off of the railroad's premises to determine the prices of some products which he wishes to buy after he has completed his work for that day with

the railroad. During his lunch visit in the liquor store a robbery takes place and the robber shoots and injures the employee. Under plaintiff's theory the railroad would be liable even though the injury did not occur at a place of work but occurred while the employee was on a lunch break during which time collective bargaining agreements required that he be paid and during which time he may have been "on call". Another example directly related to the present case would be the situation where (as one employee did in the present case) an employee goes home to eat during his lunch break and while at home an individual sets the house on fire and the employee is injured in that fire. Can it truly be said that the FELA was intended to cover the employee in such a situation! As liberally as the FELA is interpreted it does not seem that the railroad could or should be held liable under such fact situations and no cases exist going that far.

This Court in *Inman, supra,* recognized these limits in interpreting the FELA. Other courts have also recognized similar limits which are applicable to the present case. In *Simpson v. Texas & New Orleans Railroad Company,* (1962, 5th Cir.) 297 F. 2d 660, the plaintiff was injured while working as a messenger of the railroad. He was furnished by the railroad with a motorcycle which he was required to use in his employment. While using the motorcycle in such employment it became inoperative. Plaintiff was then required to take public transportation by his supervisor to continue his mail route. Upon getting off the bus public transportation in the vicinity of the railroad's depot, while it was raining hard, plaintiff was struck by an automobile while he was in the process of crossing the street. The Appeals Court in *Simpson* upheld a judgment sustain-

ing the railroad's motion to dismiss the Complaint under the Federal Employers' Liability Act on the ground that it failed to state a claim upon which relief could be granted.

California has taken a similar attitude. The recent case of *Smith v. Southern Pacific Company* is in point. This is an unpublished decision rendered by the Court of Appeal—First Appellate District, October 28, 1971.[1] In this case the plaintiff was the administratrix of the Estate of Robert Smith, defendant railroad's employee. The Complaint filed against the defendant alleged that the deceased had been killed as a result of the negligence of the defendant in failing to furnish deceased with a reasonably safe place to work and reasonably safe and suitable equipment. The jury returned a verdict for plaintiff in the sum of $50,000.00 and the trial court granted a motion for judgment notwithstanding the verdict and the order granting motion for a new trial. The evidence in *Smith* disclosed that the decedent was a switchman and while employed was struck and killed by an automobile while he was crossing Alameda Street in an industrial part of Oakland for the purpose of apparently opening certain gates of the American Can Company or to use a phone there on defendant railroad's business. Those activities would have come within the duties of the decedent's employment. The decedent was struck by an automobile at a point near the middle of Alameda Street that was speeding, driving without headlights, and whose driver was not watching the road ahead consistently. Fur-

[1]A copy of the decision is attached hereto in Appendix "B"; the California Supreme Court denied a hearing; and, the United States Supreme Court denied a petition for a writ of certiorari 4-3-72.

ther, evidence indicated that there had been railroad employee complaints regarding the danger and frequent accidents in the area.

It is spurious for petitioner to argue that he has been held by the Court of Appeal's decision to have assumed the risk. No such defense was pled by the defendant nor was any instruction given on such a defense at the trial. It is only on appeal that this argument has been made for the first time.

It is Hornbook law that the defendant railroad under the above Act neither insures nor guarantees its employees against the possibility of accident and it can be held liable only if it is found that it failed to perform a duty imposed by law. *Wilkerson v. McCarthy,* (1948) 336 U.S. 53 69 S.Ct. 413, 93 L.Ed. 497, rehearing denied, 336 U.S. 940, 69 S.Ct. 744, 93 L.Ed. 1098. No such duty existed in the present case.

Conclusion.

The decision is clearly correct and is not in conflict with any decision of this court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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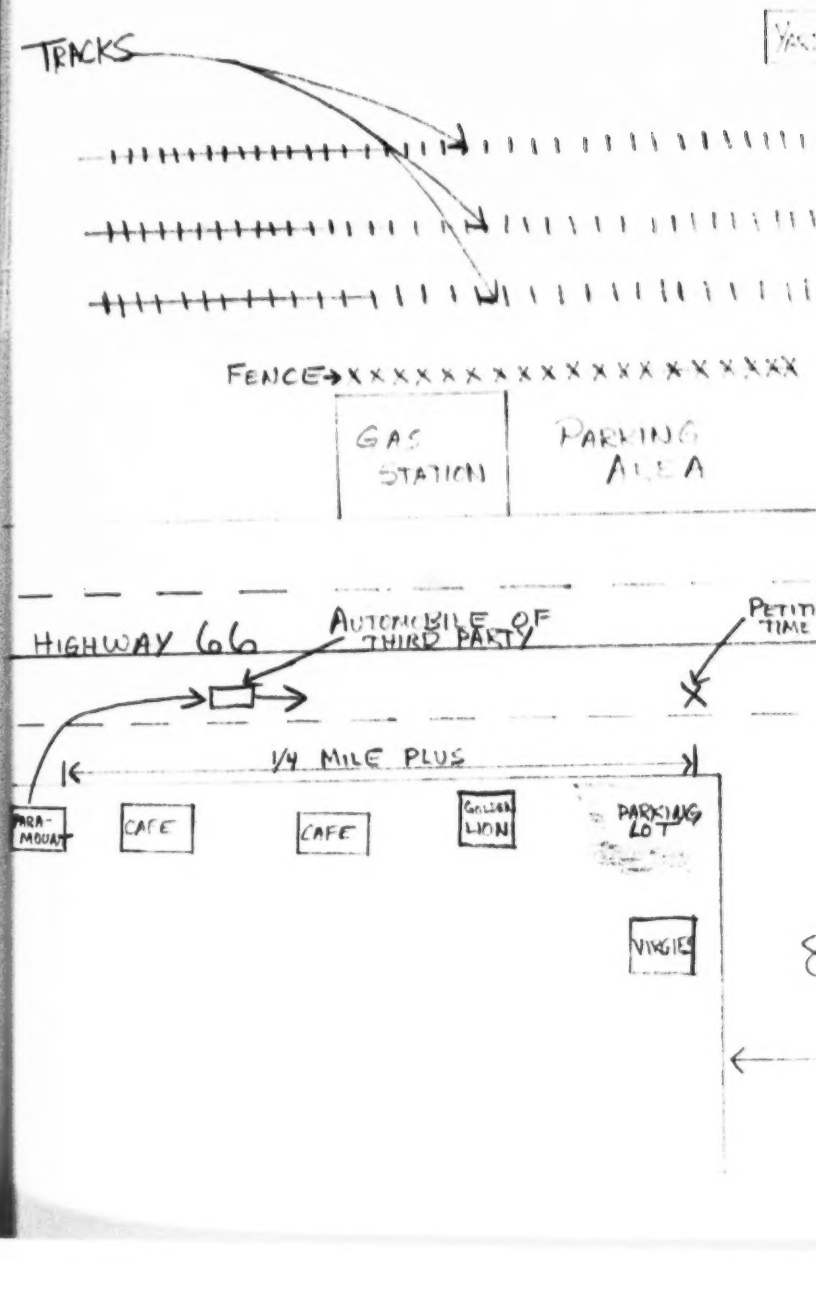
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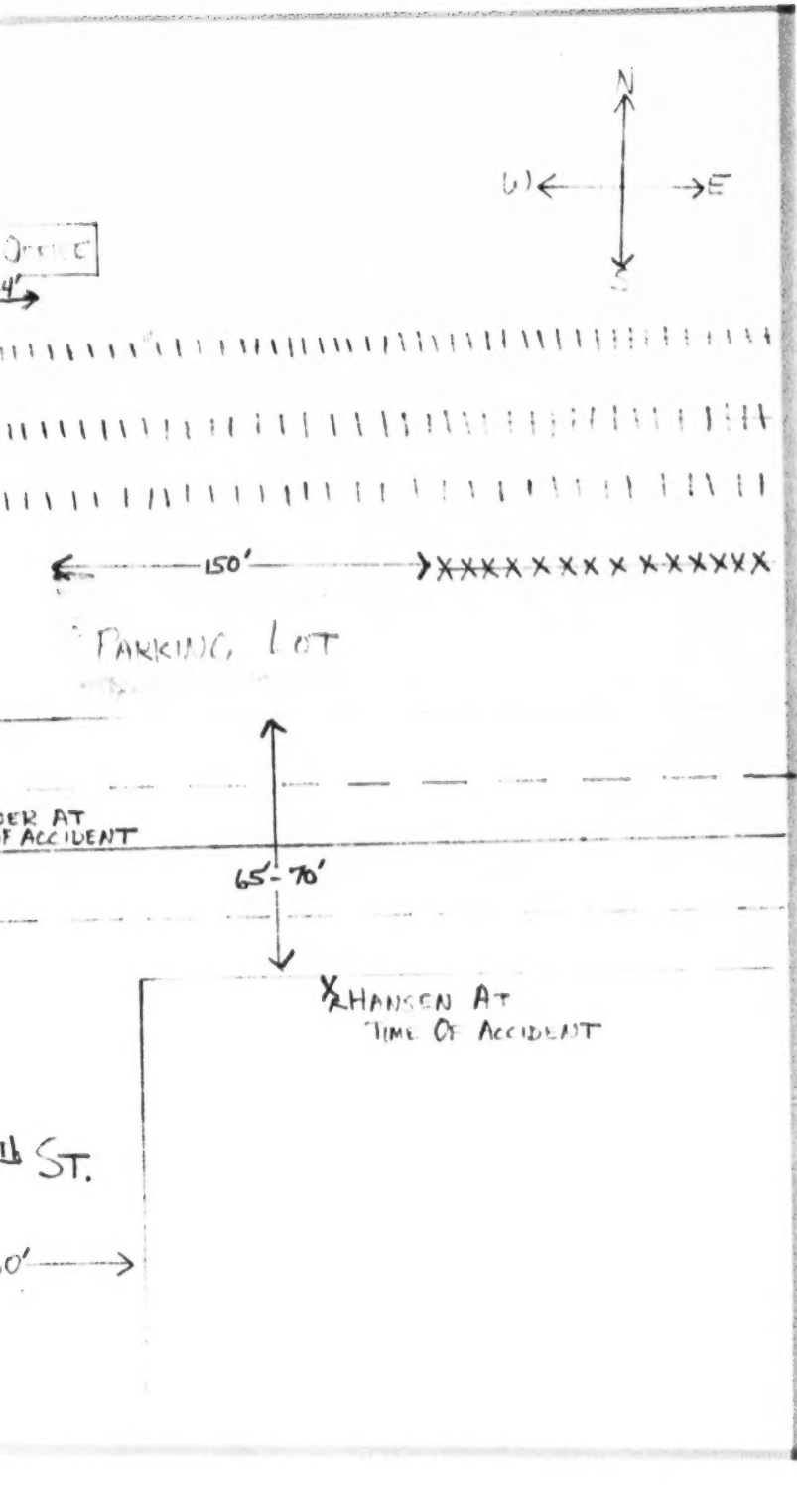
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APPENDIX B.

Opinion of the Court of Appeal.

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal of the State of California, First Appellate District, Division Three.

Florence E. Smith, Administratrix of the Estate of Robert Smith, deceased, Plaintiff and Appellant, vs. Southern Pacific Company, a corporation, Defendant and Respondent. 1 Civil 27643 (Sup. Ct. No. 573,-210).

Filed: October 28, 1971.

Plaintiff appeals from a judgment notwithstanding the verdict entered in favor of defendant and from an order granting motion for new trial.

On December 1, 1966, appellant, as administratrix of the estate of Robert Smith, filed an action under the Federal Employers' Liability Act, 45 U.S.C.A., section 51, et seq., alleging that the deceased had been killed as a result of the negligence of the defendant in failing to furnish deceased with a reasonably safe place to work and reasonably safe and suitable equipment.

The jury returned a verdict for plaintiff in the sum of $50,000 and the trial court granted a motion for judgment notwithstanding the verdict and the order granting motion for a new trial.

The sole issue necessary for consideration on this appeal is whether there is a complete absence of probative facts that negligence of the employer played a part in causing the death for which damages are sought.

The evidence disclosed that on April 12, 1966, at approximately 4:00 a.m., Robert Smith (Smith), a

44-year-old switchman employed by the Southern Pacific Company (S.P. Co.) was struck and killed by an automobile while crossing Alameda Street in an industrial part of Oakland.

On the night of the accident, Smith was the foreman of a crew of four. The crew's duties consisted of picking up and delivering freight cars to and from various "side industries" whose tracks connected with the railroad tracks. The industries were located on one side of Alameda Street. The S.P. Co.'s railroad tracks were located on the street side and connecting tracks crossed Alameda Street.

Although the exact reasons that Smith walked across Alameda Street are unknown, it may be accepted that he was in the course of his employment. He apparently intended to open certain gates of the American Can Company or to use a phone on S.P. Co.'s business. Both activities would come within the duties of his employment. Alameda Street was a long industrial street with no intersections or crosswalks in the immediate area. The night was dark, the street lighting was poor, and it was misty. Smith was wearing a yellow hard hat and was carrying a lighted switchman's lantern. Smith got to a point near the middle of Alameda Street when he was struck by an automobile driven by Mrs. Trudy Bales Coker. Mrs. Coker did not see Smith before she collided with him.

Mrs. Coker at the time of the accident was driving approximately 40-45 miles per hour in a 25-mile per hour zone in an attempt to elude a would-be suitor who was chasing her in his car. In attempting to do so, she had turned out her headlights. She also testified that she was not watching the road consistently during

the chase but was glancing over her shoulder and looking into her rear view mirror in an attempt to keep an eye on the car following her.

On the evening in question, Mrs. Coker had been working at her job as a barmaid until sometime after 2:00 a.m. She had been drinking beer. Although the extent of her drinking was not brought out with certainty, she conceded that she felt the effects of the beer. She felt "[j]ust kind of relaxed; not drunk or not sober, but just relaxed." She was initially charged with felony vehicular manslaughter. Subsequently, the charge was reduced to felony hit-and-run to which she pleaded guilty.

As this case is based upon the Federal Employees' Liability Act, the question of sufficiency of the evidence is controlled by federal law. (Waller v. Southern Pacific Co., 66 Cal.2d 201, 206.)

In *Rogers v. Missouri Pacif. R. Co.*, 352 U.S. 500, the United States Supreme Court laid down the rule that "[j]udicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Emphasis added.)" (Id. at 506-507.)

Appellant points to two ways in which the jury could reasonably have concluded that the employer was negligent. First, the jury could have agreed that S.P. Co. should have eliminated the need to cross the street. Second, in those instances where Smith neces-

sarily had to cross, S.P. Co. should have provided equipment which would have made the employee crossing the street more visible to traffic, such as a helmet with phosphorous strips, a luminous vest or a flashlight with a phosphorous wand. Appellant also emphasizes that there were employee complaints regarding the danger and frequent accidents in the area.

"The test of negligence in supplying the employee a safe place to work is 'whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger.' [Citations.]" (Mortensen v. Southern Pacific Co., 245 Cal.App.2d 241, 244.)

In *Simpson v. Texas and New Orleans Railroad Company*, 297 F.2d 660, the court said: ". . . [T]he plain language of the Federal Employers' Liability Act makes unmistakably clear that it is not a workmen's compensation act but provides relief only for injury or death resulting in whole or in part from the negligence of the employer railroad, . . .

* * * * *

"No decision has been cited, nor have we found any, holding an employer railroad liable under the Act for an injury incurred in the performance of an everyday, ordinary action, such as walking on the street or crossing the street, when the injury results from the action of some third person. . . ." (Id. at 662.)

Appellant suggests that the danger of crossing the street on foot could have been eliminated by having American Can Employees open the gates and by relocating the phone. We cannot agree, however, that the failure to do so created a danger. There was no satisfactory evidence that the area was particularly hazardous.

Appellant's argument that the railroad company should have furnished additional safety equipment does not find reasonable support under the circumstances here. The equipment suggested by appellant required a light source to be shining on it which would not have benefited Smith as the car was being driven without lights. Also it was not shown that this suggested light source would be any more visible than the lantern appellant was carrying. The most highly visible piece of equipment mentioned in the case was a flare which was in fact available to appellant had he felt he was in a position which warranted its use.

At the time of the accident, Smith was wearing a "bright yellow" hard hat, was carrying a railroad lantern that was used for railroad signalling for distances up to one mile. Smith was the engine foreman on the train switching detail and he, undoubtedly, could have provided warning lights, flares, etc., if there was an existing danger.

Here Smith was hit by a motorist driving an automobile far in excess of the state's speed limits, while under the influence of alcohol, in the dark of night with the headlights of her vehicle turned off. Further, Mrs. Coker believed she was looking in the rear view mirror at the moment of impact. Under these circumstances, she would not have seen Smith regardless of his clothing or what he was carrying.

We have determined that appellant has not met the burden of proving that the street where deceased was walking was an unsafe place to work. (See Inman v. Baltimore Ohio R. Co., 361 U.S. 138.) We believe that the trial court was justified in concluding that the sole cause of the accident in question was the negligent

driving of the vehicle by Mrs. Coker and that there is a complete absence of probative facts that any lack of care of respondent played a part in the death for which damages are sought.

The judgment notwithstanding the verdict is affirmed. The appeal from the order granting a new trial is dismissed as moot. (Code Civ. Proc., § 629; Kaake v. Lott, 252 Cal.App.2d 895, 901.)

CERTIFIED FOR NONPUBLICATION

Brown (H. C.), *J.*

We concur:

Draper, *P. J.*

Caldecott, *J.*